take action in court for specific performance. As well as taking out the writs, these purchasers, as they were perfectly entitled to do and should for their own protection do, lodged private caveats against these properties to prevent the appellant from dealing with them in a way as to effect their interests therein.

By section 327 National Land Code, any person aggrieved by the existence of a private caveat may apply to the court for an order for its removal. The appellant exercised his right to apply, but on his application, the court in each case having regard to the circumstances of the case made an order extending the caveat until further order. This order was registered against the title.

Subsequently the appellant sold the same properties to Michael Chong. This purchaser quickly realised the existence of these prior agreements of sale. His solution to the problem facing him was to come to an arrangement with the prior purchasers under which he satisfied their claims or expectations to such an extent that they withdrew the private caveats lodged by them and discontinued their actions against the appellant.

Section 325 National Land Code provides that a private caveat may be withdrawn at any time by a notice in writing given to the Registrar by the person or body at whose instance it was entered. The prior purchasers acted under this section and it appearing to the Registrar that their notices were perfectly valid, he removed the private caveats.

Next, the Registrar registered transfers of these properties from the appellant to Michael Chong. In this Originating Motion, the appellant therefore sought to set aside the transfers.

In the appeal against the action of the Registrar of Titles, the appellant first contended that the registration of the transfers to Michael Chong was wrong in view of the existence of the private caveats. When it was pointed out to him that the private caveats had been removed, he came up with a contention that the withdrawal of the private caveats was wrong and in disobedience, if not in contempt, of the court which had ordered the continuation of the caveats until further order and of this order there had been none.

Having ascertained from the Registrar of Titles who appeared by Federal Counsel that the withdrawal of the private caveats was at the instance of the caveators, we dismissed the appeal against the order confirming the action of the Registrar. We saw no reason why the order of the court which was made necessary by the application of the appellant should operate to prevent the caveators from withdrawing their caveats themselves without this further order of the court. There could be no doubt that if it had been necessary for the caveators to apply to court, the court would not have the slightest hesitation in ordering the withdrawal.

The appellants shall pay the costs of both appeals to all the respondents.

Appeals dismissed.

Solicitors: *S.K. Lingam & Co.; N. Ramachandran & Co.; Lee Boon Peng & Co.*

INTERNATIONAL TIMES & ORS. v. LEONG HO YUEN

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho. J.) September 5, 1979 & February 28, 1980]

[Kuching — Federal Court Civil Appeal No. 128 of 1979]

Tort — Libel — Defamatory publication — Defence of justification and fair comment — Onus of proof — Whether onus of proof has shifted — Presumption of falsehood.

Evidence — Onus of proof — Evidence Act, 1950, ss. 102 and 103.

In this case the respondent brought an action for defamation against the appellants as he took exception to two sentences in an open letter published in the *Sarawak International Times* and *Sarawak Siang Pao*, which alleged that he kept concubines. The learned trial judge held that the words complained of were defamatory of the respondent. The appellants' main defences were justification and fair comment. At the trial the appellants called three witnesses to prove these defences; whilst the respondent did not lead any evidence in rebuttal at all. The learned trial judge after considering the evidence before him held that the appellants had failed to establish either or both of these defences and he gave judgment for the respondent. The appellants appealed. On appeal it was contended that the evidence adduced by the appellants had shifted the onus of proof onto the respondent, and as the respondent had not given evidence at all on the question of justification and fair comment, the appellants had fully discharged their burden of proving these two defences and therefore were entitled to judgment.

Held: (1) as the appellants in this case relied on justification and fair comment the burden of proving these defences rested entirely upon them;

(2) having regard to the evidence which was accepted by the learned judge and the principles of law which operate in favour of the respondent, the onus of proof had not shifted to the respondent;

(3) the onus was still on the appellants to prove the truth of their imputations and as they had failed to do so, judgment was rightly given for the respondents.

Cases referred to:-

(1) *Nanji & Co.*, v. *Jatashankar Dossa & Ors.*, A.I.R. 1961 S.C. 1474, 1478.

(2) *Raghavamma* v. *Chenchamma* A.I.R. 1964 S.C. 136, 143.

(3) *Indar Singh* v. *Thakar Singh* (1921) 2 I.L.R. Lah. 207, 216.

(4) *Mohabbat Ali Khan* v. *Mohamed Ibrahim Khan* (1929) 56 I.A. 201, 207.

(5) *Belt* v. *Lawes* (1882) 51 L.J. Q.B. 359, 361.

(6) *Peters* v. *Bradlaugh* (1888) 4 T.L.R. 467, 472.

(7) *Beit* v. *Markham* (1901) 18 T.L.R. 143, 146.

FEDERAL COURT.

Humphrey Ball (*P. Tan* with him) for the appellants.

Matthew Chan for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): As far as can be gleaned from the evidence given at the trial, the factual background of this case began with the arrest and detention of the 6th appellant Chan Siaw Hee and two other persons, Lim Kim Seng and Teng Chew Seng. All three were members of the Sarawak United People's Party (SUPP). On November 1, 1969 all three were released. On the same day a press conference arranged for the 6th appellant by the Information Department was held at Radio Malaysia Sarawak Building, and on the following day (November 2, 1969) the *Sarawak Vanguard*,

a Chinese language newspaper owned and controlled by the respondent and his family devoted its front page to carry the news of the release and the 6th appellant's press conference. It appears that after the release the 6th appellant became the publicity officer of SUPP whilst the position of the other two ex-detainees in the party was uncertain. This situation led to what appears to be a misunderstanding between these two men. Soon the *Sarawak Vanguard* and other Chinese language newspapers in Sarawak, i.e. the *Sarawak International Times* and the *Sarawak Siang Pao* began to print articles and letters concerning the positions of the 6th appellant and Mr. Lim Kim Seng. The *Sarawak Vanguard* seemed to take the side of Mr. Lim Kim Seng whilst the other newspapers the side of the 6th appellant. Between November 2, 1969 and November 21, 1970, the *Sarawak Vanguard* published no less than six articles and letters under various sarcastic pen names such as "Grave Digger Evergreen Willow", "Fox Tiga" and "Curry Rice", all critical of the 6th appellant. These articles and letters were produced as Exhibits D2(a)-(f). Presumably provoked by these letters and articles, the 6th appellant wrote an open letter critical of the respondent. This letter was published in the *Sarawak International Times* and the *Sarawak Siang Pao* on November 23, 1970, just two days after the *Sarawak Vanguard* published Exhibit D2(f), which purported to be a re-publication of the 6th appellant's press conference held on November 2, 1969.

The respondent took exception to the following two sentences of the open letter which read as follows: —

"(1) Recently I think Mr. Leong is exceptionally strong in his physical strength even though he is briskly playing around and entangling with his numerous 'imperial concubines,' he still can find time to hire out his strength for his intimate friend Lim....;

(2) ...let it not because he has given so much devotion to his 'imperial concubines' so much so that his mind is not steady and he has no heart to check up the headline which was published a year ago...."

An apology was demanded of the 6th appellant and the two newspapers, the *Sarawak International Times* and the *Sarawak Siang Pao*. As this was not forthcoming from any of them, the respondent started the present court proceedings suing the appellants for defamation on account of the two sentences in the open letter. The appellants did not deny that the open letter was written by the 6th appellant and published by the two newspapers but claimed that its English translation furnished by the respondent was not accurate and that the words complained of do not bear any meaning defamatory of the respondent. At the trial the respondent submitted two versions of the translations, Exhibit P3 and Exhibit P4, whilst the appellants submitted their own version Exhibit D3. However, nothing really turns upon these three exhibits as the translations are substantially the same. The learned trial judge held that the words complained of are defamatory of the respondent and since no appeal is raised against the ruling on this point, nothing more will be said on it.

The appellants' main defences are justification and fair comment. At the trial the appellants called three witnesses to prove these defences; whilst the respondent did not lead any evidence in rebuttal at all. The learned trial judge after considering the evidence before him held that the appellants failed to establish either or both of these defences, and reserving only the question of damages, he gave the judgment for the respondent. Hence the present appeal before us. Mr. Humphrey Ball, counsel for the appellant, submitted to us that the evidence adduced by the appellants had shifted the onus of proof on to the respondent and as the respondent had not given any evidence at all on the question of justification and fair comment, the appellants had fully discharged their burden of proving these two defences and therefore was entitled to the judgment and to this appeal.

For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co.* v. *Jatashankar Dossa & Ors.*[1] and *Raghavamma* v. *Chenchamma*[2]). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley* on Libel and Slander 7th Edition paras. 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

In their defences of justification and fair comment the appellants vouched for the truth of the statements that the respondent "has been cohabiting with and keeping as his mistresses or concubines *two women* with whom he had children" and that the respondent "has kept *several women* as his mistresses and concubines. The combined effect of these two imputations is that the onus of proof upon the appellants is not merely to prove that the two particular women are the respondent's mistresses or concubines but also that he has kept some other women as concubines or mistresses. Let us now examine the evidence which the appellants had adduced in order to see whether the onus of proof has shifted to the respondent's side or not.

The appellants called three witnesses. These are Tay Hiang Boon (DW1), Chan Siaw Hee the sixth appellant (DW2), and Lim Kui Seng (DW3). They gave evidence relating to the following five women: (1) Lee Yoke Lan (*f*), otherwise known as Madam Lee or Mrs. Leong; (2) Goh Yoke Sze (*f*) also known

as Ah Sam (domestic servant); (3) Chew Gueh Hua (*f*); (4) Goh Siew Hiang (*f*); and (5) an unidentified woman named "Siaw"

As to Lee Yoke Lan (*f*), the three witnesses agreed that she is the principal wife of the respondent. Lee Yoke Lan (*f*) bore him five children: three sons and two daughters. The three sons are Richard Leong, Desmond Leong and Leong Kok Cheong. All three were working in the *Sarawak Vanguard*.

As to the second woman Goh Yoke Sze (*f*) also known as Ah Sam, both DW1 and DW2 claimed that they believed her to be his mistress or concubine, whilst DW3 said that she is the respondent's second wife. The learned trial judge accepted the evidence of DW3 and rejected the evidence of DW1 and DW2. For ourselves, we see no reason to find fault with the course taken by the learned judge. It seems to us that DW1 and DW2 based their belief upon the parentage of a boy named Leong Kok Lang. According to DW1, this boy is the son of the respondent because the respondent had told him so. DW1, however, did not know nor did he say what relationship the respondent has with Ah Sam but he knew that Ah Sam and the boy live in a house belonging to the respondent in the vicinity of Mathie's Road after Lee Yoke Lan (*f*) and his children had moved out from that house to a new one at Ellis Road. DW2 also claimed that Ah Sam was the mother of the boy but gave no reason for nor source of his knowledge and belief. Surely the fact that the respondent is the father of Leong Kok Lang and that Ah Sam is his mother does not necessarily follow that the relationship between the respondent and Ah Sam is one of master and mistress or emperor and his concubines and that the boy Leong Kok Lang is an illegitimate child. No such presumption arises. It is settled law, however, that where a man and a woman have cohabited continuously for a number of years the law presumes in favour of marriage and against concubinage unless there is a strong and distinct evidence to repel the presumption (*Indar Singh* v. *Thakar Singh*[3] approved by their Lordships the Privy Council in *Mohabbat Ali Khan* v. *Mohamed Ibrahim Khan*[4]). Thus, having regard to the unsatisfactory nature of the evidence of DW1 and DW2 and their lack of knowledge of the matter upon which they based their belief, the learned judge is right in rejecting their evidence in preference of that of DW2. The effect of the rejection is that Goh Yoke Sze (*f*) alias Ah Sam is the respondent's second wife.

As regards the third woman Chew Gueh Hwa (*f*), it appears that she lives at Taipoo Association Building and has a few children. DW1 said that according to his observation and understanding she is the respondent's concubine because he had seen the respondent and her together with some children in a car. DW2 supported DW1 because he had once seen the respondent's car parked at the compound of the Taipoo Association Building. Both these witnesses admitted that neither the respondent nor Chew Gueh Hua (*f*) ever spoke to any of them about their relationship. Contrary to their evidence, however, DW3 said that Chew Gueh Hua (*f*) is the third wife of the respondent. Again the evidence of DW1 and DW2 was rejected by the learned trial judge in preference to that of DW2. Granted that the combined effect of the evidence of DW1 and DW2 is that there exists a relationship between the respondent and Chew Gueh Hua (*f*), but their evidence does not go far enough nor does it necessarily follow that the relationship is an improper one. The evidence adduced by the appellants therefore falls far short of showing that Chew Gueh Hua (*f*) is the respondent's mistress or concubine.

As regards the fourth woman Goh Siew Hiang (*f*), according to DW2 she was a fellow employee of the *Sarawak Vanguard*. She was pregnant and her mother took her away to Singapore and Hongkong. There is, however, absolutely no evidence to show who was responsible for her pregnancy, nor is there any evidence to indicate that the respondent had anything to do with it. Yet DW2 was bold enough to say in his evidence that he had seen the respondent twice before 1965 going up to the first floor of a shop in Padungan Road, where not only Goh Siew Hiang (*f*) but also several other families lived. Goh Siew Hiang (*f*) was living in one of the rooms on the first floor of the shop with her mother. By saying that he had seen the respondent going up to the first floor, DW2 wanted the court to believe that the respondent went to see Goh Siew Hiang. The suggestion is, in our view, preposterous. How could he know that the respondent went up to visit Goh Siew Hiang when the floor itself consisted of many rooms, each occupied by different family? Merely seeing the respondent going up to the first floor, without any other evidence, does not give any one the right to conclude with any degree of probability that he had gone to see Goh Siew Hiang (*f*). Indeed the absurdity of DW2's evidence is further accentuated by the evidence relating to Goh Siew Hiang's age. At the time of trial she was twenty-five years old, and if what the respondent related is true, the incident must have taken place when she was only twelve years old — a circumstance which the learned judge held to be highly improbable. Thus, the evidence of DW2 shows that he had no knowledge at all as to whether the respondent had any relationship with Goh Siew Hiang (*f*). His evidence is nothing but a desperate attempt to justify the allegation that he had made regarding the respondent keeping numerous imperial concubines. We are therefore not surprised to see that the learned judge regarded the evidence relating to Goh Siew Hiang (*f*) as being inconclusive and rejected it altogether.

As regards the fifth woman, the unidentified "Siaw", nothing is known for certain whether she ever even existed. According to DW2, the respondent mentioned to him a woman whose surname was Siaw and, therefore, he concluded that he must have had intimate relationship with "Siaw". This evidence is really absurd and so wild that it did not receive any treatment by the learned trial judge at all. Nothing is established by this evidence.

Having reviewed and analysed the evidence of the appellants' witnesses, can we now say that the onus of proof has shifted to the respondent? Mr. Humphrey Ball submitted to us that as the appellants had proved that the respondent cohabited with these two

women, Goh Yoke Sze (*f*) and Chew Gueh Hua (*f*), the onus had then shifted to the respondent. We, however, do not agree with this submission. In our view, whether or not the onus of proof has shifted depends entirely upon the weight which the learned judge placed on the evidence before him and upon what presumption of law is there which operates either in favour or against the respondent. In this case, it is clear that the learned judge, after weighing the evidence very carefully, arrived at the conclusion that the first three women are wives, the first being the principal wife and the other two being the second and third wives. There is therefore no need for the respondent to lead any evidence at all as to his relationship with any of these three women. He is entitled to rely on the evidence of DW3 and on the presumption of marriage against concubinage, which we have already dealt with earlier.

The other presumption of law which operates in his favour is the presumption of falsehood, In a suit for defamation, once the words complained of are proved to be defamatory and published, the respondent being the plaintiff is not bound to prove falsity of these words because the law presumes it to be in his favour (*Belt* v. *Lawes*[5]). The result is that it is for the appellants, being the defendants in this case, to prove that these words are true. We have seen that they have been unable to do so. At the very best the evidence of DW1 and DW2 only shows that they believe the allegations they made against the respondent to be true without giving any satisfactory basis for such belief. Such evidence does not shift the onus of proof on to the respondent's side because belief is not a defence (*Peters* v. *Bradlaugh*[6]). Further their allegations claim that the respondent keeps numerous concubines. Surely by proving only two women who could possibly be his concubines will not be sufficient proof to discharge the onus because the proof of justification must be precise (*Beit* v. *Markham*[7]).

Therefore, on the basis of the evidence and presumptions, the appellants had not shifted the onus of proof to the respondent. That being the case, there is no need for the court to consider whether the respondent's wives were registered under the Chinese Marriage Ordinance of Sarawak (Cap. 72) as was submitted by counsel for the appellants, because the issue before the court is not whether the respondent's marriage to these women is valid or invalid. In any case, we do not think that the non-registration of his marriages reduces his wives to the status of concubines. Counsel for the appellants further submitted to us that they are not bound to prove the negative, i.e. that these women are not wives, and so it is for the respondent to prove the converse, i.e. that these women are his wives. This is a very ingenious way of playing with the word "negative" in order to get themselves out of difficulties of proving the truth of their imputations that these women are mistresses or concubines of the respondent. The word negative is not an absolute term but a relative one. To say that a woman is a concubine is to deny her the status of a wife. On the other hand, to say that she is a wife is to negative her status as a mistress or a concubine. Therefore, there is really no substance in the submission which demands the respondent to prove that these two women are his wives. Such a submission is tantamounting to asking the respondent to discharge the onus of proof which is not his but the appellants'.

In this case it may well be that the appellants are unhappy because the respondent did not give any evidence at all as to his relationship with any of these three women or any other woman. No question was put to him on the subject when he gave evidence during the plaintiff's case, because of the ruling by the learned trial judge to the effect that the respondent's evidence on the appellants' defence of justification and fair comment should be given only after the appellants had given their evidence. However, when the appellants had completed their evidence and closed their case, counsel for the respondent informed the court that he did not wish to call any evidence in rebuttal as presumably he must have been relying upon the evidence of DW3 who said that these three women are the respondent's wives. Thus the respondent was not examined at all on the appellants' defences of justification and fair comment. On the other hand, there was nothing to prevent the appellants' counsel from recalling the respondent for the purpose of cross-examining him. However, this was not done. Instead, their counsel was contented to leave the matter to the learned judge to make a finding, knowing full well that there is a conflict between the evidence of DW1 and DW2 on the one hand and that of DW3 on the other. When the learned judge made a finding that the two women are the respondent's wives and not his concubines, the appellants now claim that the onus of proof had shifted on to the respondent who must then discharge it. We have considered this point very carefully and we come to the conclusion that having regard to the evidence which was accepted by the learned judge and the presumptions of law which operate in favour of the respondent, we do not think that the onus of proof had shifted on to the respondent's side. The onus was still on the side of the appellants who must prove the truth of their imputations and basic facts upon which their comment is based. This they had failed to do.

That being the case, we therefore dismiss this appeal with costs. The deposit should be paid to the respondent on account of costs.

Appeal dismissed.

Solicitors: *Yong & Co.; Chan & Co.*

AU KONG WENG v. BAR COMMITTEE, PAHANG

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Wan Suleiman, Chang Min Tat F.JJ. & Abdul Hamid J.) February 21 & March 14, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 175 of 1979]

Legal Profession — Advocates and Solicitors — Finding of Disciplinary Committee that advocate and solicitor guilty of unbefitting conduct — Suspension — Appeal to Federal Court — Undertaking given by advocate and solicitor — Breach of undertaking — Legal Profession Act, 1976, s. 93(2)(b).

In this case the Disciplinary Committee of the Pahang Bar Committee found that the appellant had been guilty of